

# Government Drug Testing and Individual Privacy Rights: Crying Wolf in the Workplace

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"The [W]ord has gone out. . . . If you want to stay in, stop taking drugs."<sup>1</sup>

"In order to win the war against drugs, we must not sacrifice the life of the Constitution in the battle."<sup>2</sup>

## I. Introduction

In recent months, public attention has dramatically been drawn to the dangers posed by substance abuse and drug dependence.<sup>3</sup> While much of the publicity has focused on educational programs and efforts to halt the flow of narcotics to the United States, the role of drug testing in the workplace has surfaced as a central theme of the campaign against drug abuse. The effects of substance abuse on the property rights of private employers and of drug testing on the privacy rights of private employees have been discussed and debated elsewhere.<sup>4</sup> However, the constitutional and policy problems

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1. *The Enemy Within*, TIME, Sept. 15, 1986, at 58, 71, col. 3 (statement of Julian Barber, Pentagon health official).

2. *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1511 (D.N.J. 1986).

3. See, e.g., President and Mrs. Reagan, remarks for a national television address on drug abuse and prevention (Sept. 14, 1986) reprinted in OFFICE OF THE PRESS SECRETARY, THE WHITE HOUSE PRESS RELEASE. During the address, the President intoned, "Drugs are menacing our society. They're threatening our values and undercutting our institutions. They're killing our children." *Id.* at 1. The joint speech marked, in the words of the first lady, the beginning of a "great new national crusade" against illegal narcotics. *Id.* at 6. See also *The Enemy Within*, *supra* note 1.

4. Analysts have estimated that the property damage, absenteeism, lost productivity, quality control programs, and higher health care costs engendered by substance abuse cost American businesses tens of billions of dollars annually. Geidt, *Drug and Alcohol Abuse in the Work Place: Balancing Employer and Employee Rights*, 11 EMPLOYEE REL. L.J. 181 (1985). See generally Adams & Remmers, *Drugs and Alcohol in the Workplace: Technology, Law and Policy*, 2 SANTA CLARA COMPUTER & HIGH-TECH. L.J. 305 (1986); SUBSTANCE ABUSE IN THE WORKPLACE (D. Smith, D. Wesson, F. Zerkin & J. Novey eds. 1985). In the absence of state action or governmental interference, employee claims rely most heavily upon state constitutional rights to privacy, common law protection against tortious invasion of privacy, state and federal statutes recognizing chemical dependency as a handicap, and, in the case of unionized labor, fair dealing and collective bargaining powers under the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1982). Though the NLRB has never ruled on drug testing, the Board has generally held that unilateral

created by suspicionless drug testing of government employees have become the subject of vigorous and unresolved arguments pitting individual privacy rights guaranteed by the fourth amendment against the fundamental government interest in public safety and workplace discipline.<sup>5</sup> The randomness of government drug testing arguably violates two basic tenets of the fourth amendment: the prohibition against unreasonable search and seizure and the requirement of a warrant supported by probable cause. Conversely, the emphatic and immediate social interest in a drug-free environment militates for stringent measures to detect and eradicate substance abuse. This Current Topic argues that while the fourth amendment does not act as a complete bar to non-cause drug testing,<sup>6</sup> it imposes a substantial evidentiary burden on the government which can only be overcome in a few severely circumscribed situations. In all other cases, suspicionless government drug testing of employees violates both constitutional prohibitions and social policy objectives.

## II. *The Fourth Amendment Background*

The vast majority of drug urinalysis cases<sup>7</sup> involving government employees have grappled with the issue in terms of the privacy rights created by the search and seizure restrictions of the fourth

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changes in work rules violate the mandatory bargaining requirement of the Act. See *Chemtronics, Inc.*, 236 N.L.R.B. 178, 191 (1978) (no-smoking policy held to be mandatory subject of bargaining). These limitations are generally meager protection against private employer power.

5. The debate over public-sector drug testing has been punctuated by a series of attacks, both vitriolic and poignant. The image of George Orwell's Big Brother has been consistently raised by skeptical civil libertarians. See *Capua v. City of Plainfield*, 643 F. Supp. at 1511; *Plan for School Drug Testing Divides Texas Town*, N.Y. Times, Sept. 30, 1986, at A16, col. 4 ("When I first heard about . . . [the plan for mandatory drug testing of all 6th through 12th graders in Beaumont district schools] . . . I thought of that book '1984'. . . . I'm amazed how many people are so gung-ho for it") (quoting Wanda Grimes, local PTA president). Conversely, the devastating impact of drug use has pushed many observers to advocate an all-out battle despite the potential harm to personal freedoms. See *The Enemy Within*, *supra* note 1, at 59 ("the casualties may range from a thug in Miami to the dearest of civil liberties. . . . Yet the war is urgent and necessary. Suddenly the whole system feels poisoned by a world in which millions of one's countrymen eagerly dream themselves to death.").

6. Random and non-cause are herein used interchangeably to denote searches lacking any individualized basis for suspicion. While random searches differ in some degree from mandatory or suspicionless testing, they raise essentially equivalent constitutional questions. These investigatory methods are compared with searches based upon differing levels of individualized evidence, e.g., reasonable suspicion or probable cause.

7. While other methods of drug testing exist, most notably blood analysis, urinalysis programs are far and away the most frequently used means of detecting employee drug use. See *Adams & Remmers*, *supra* note 4, at 308-09, 313.

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amendment.<sup>8</sup> This provision prohibits the government from conducting unreasonable searches and seizures.<sup>9</sup> The Supreme Court, however, has never set out a comprehensive analysis of the amendment.<sup>10</sup> Prior to 1967, judicial interpretation of the search and seizure clause demarcated certain constitutionally protected zones; absent a warrant based upon probable cause, the government could not physically breach these areas of privacy.<sup>11</sup> The Supreme Court periodically elaborated upon the definition of the textually compelled zones, in cases dealing with bodies,<sup>12</sup> individual attire,<sup>13</sup> apartments,<sup>14</sup> personal letters,<sup>15</sup> and automobiles.<sup>16</sup> This method of analysis provided a clear guide for law enforcement officials, but

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8. See *Shoemaker v. Handel*, 795 F.2d 1136, 1141-43 (3d Cir. 1986); *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976); *Committee for GI Rights v. Callaway*, 518 F.2d 466, 474-77 (D.C. Cir. 1975); *American Fed'n of Gov't Employees v. Weinberger*, No. 86-353 (S.D. Ga. Dec. 2, 1986) (LEXIS, Genfed library, Dist file); *National Treasury Employees Union v. Von Raab*, No. 86-3522 (E.D. La. Nov. 14, 1986) (LEXIS, Genfed library, Dist file); *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875, 879-83 (E.D. Tenn. 1986); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986); *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986); *McDonell v. Hunter*, 612 F. Supp. 1122, 1130-31 (S.D. Iowa), *aff'd*, 746 F.2d 785 (8th Cir. 1985); *Allen v. City of Marietta*, 601 F. Supp. 482, 488-92 (N.D. Ga. 1985); *Murray v. Haldeman*, 16 M.J. 74, 80-83 (C.M.A. 1983); *Patchogue-Medford Congress of Teachers v. Board of Educ.*, 505 N.Y.S.2d 888 (App. Div. 2d Dep't 1986); *Caruso v. Ward*, 506 N.Y.S.2d 789 (Sup.Ct. 1986); *Turner v. Fraternal Order of Police*, 500 A.2d 1005 (D.C. 1985); *City of Palm Bay v. Bauman*, 475 So.2d 1322 (Fla. Dist. Ct. App. 1985).

9. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." U.S. CONST. amend. IV. The fourth amendment applies to the states through the fourteenth amendment. *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949) ("security of one's privacy against arbitrary intrusion . . . which is at the core of the Fourth Amendment . . . is . . . enforceable against the States"). The amendment acts solely as a check upon sovereign authority. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

10. See Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974) (detailing barriers to comprehensive analysis of fourth amendment).

11. *Silverman v. United States*, 365 U.S. 505 (1961).

12. *Schmerber v. California*, 384 U.S. 757, 767-68 (1966).

13. *Beck v. Ohio*, 379 U.S. 89 (1964).

14. *Clinton v. Virginia*, 377 U.S. 158 (1964).

15. *Ex parte Jackson*, 96 U.S. 727 (1878).

16. *Preston v. United States*, 376 U.S. 364 (1964). On the other hand, the textual prohibition against government intrusion on persons, houses, papers, and effects did not extend to either open fields or telephone lines. *Olmstead v. United States*, 277 U.S. 438 (1928); *Hester v. United States*, 265 U.S. 57 (1924). The rationale of the *Olmstead* and *Hester* protected zones theory was eloquently summed up in *United States v. On Lee*, 193 F.2d 306, 315 (2d Cir. 1951) (Frank, J., dissenting) ("A sane, decent, civilized society must provide some oasis, some shelter from public scrutiny, some insulated enclosure, some inviolate place which is a man's castle"), *aff'd*, 343 U.S. 747 (1952).

as constitutional theory, it often proved inflexible and unfair.<sup>17</sup> Consequently, in *Katz v. United States*,<sup>18</sup> the Warren Court firmly rejected the doctrine of constitutionally protected zones:

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.<sup>19</sup>

Justice Harlan, in his famous concurrence, formulated a two-step reasonableness standard resting on both an actual, subjective expectation of privacy and a social recognition of a reasonable right to privacy.<sup>20</sup> The shift from a zone test to a reasonableness standard changed the judicial role from the application of constitutionally mandated definitions to the sifting of social and individual expectations.

The abandonment of the zone test evoked a related development in fourth amendment jurisprudence. Historically, the search and seizure safeguards required the police or other government agencies to obtain a search warrant based upon probable cause.<sup>21</sup> Beginning with the stop-and-frisk doctrine of *Terry v. Ohio*,<sup>22</sup> however, the Supreme Court gradually chipped away at the basic evidentiary requirement,<sup>23</sup> articulating instead a test weighing the nature and rea-

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17. See Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U. L. REV. 968 (1968); see also W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* § 3.2 (1984).

18. 389 U.S. 347 (1967).

19. 389 U.S. at 351.

20. *Id.* at 361 (Harlan, J., concurring). Justice Harlan's formulation has gradually emerged as the definitive interpretation of *Katz*.

21. See 389 U.S. at 355.

22. 392 U.S. 1 (1968). *Terry* articulated a doctrine that suggested that relatively unintrusive searches require less justification than probable cause. This analysis could support a general fourth amendment theory that would simply weigh the measure of intrusiveness against the public interest in the search. While this doctrinal approach never has received full recognition, it implicitly underpins modern developments in fourth amendment jurisprudence.

23. The general rule remains, albeit shakily, that searches without warrants supported by probable cause are *per se* unreasonable. *United States v. Chadwick*, 433 U.S. 1 (1977). However, the exceptions to the rule have been considerably broadened over the last two decades. These exceptions include: (1) border searches for contraband and illegal aliens, *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); (2) hot pursuit of armed criminal suspects, *Warden v. Hayden*, 387 U.S. 294 (1967); (3) airport searches for weapons, *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973); (4) entrance searches at courthouses, *Downing v. Kunzig*, 454 F.2d 1230 (6th Cir. 1972); (5) searches based upon consent, *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973); (6) regulatory inspections pursuant to a statutory scheme, *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

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sonableness of the circumstances.<sup>24</sup> This development has paved the way for the legitimization of non-cause searches<sup>25</sup> and the potential validation of random government drug testing of its employees.

### III. Drug Testing: The Judicial Reaction

Judicial analysis of drug use detection programs evolves within this new framework. Although the relative dearth of appellate decisions makes generalizing difficult, the recent spate of trial court opinions strikes some common themes. Several opinions upheld testing programs based not on random investigation but on reasonable suspicion.<sup>26</sup> In *Allen v. City of Marietta*, plaintiffs, employees of the Marietta Board of Lights and Water, claimed that defendant's drug testing program violated their fourth amendment rights. In holding the urinalysis testing constitutional, the court noted three influential factors: all tested employees were engaged in hazardous operations, the city established a clear link between drug use and actual injury, and — most significantly — the tests were conducted pursuant to individualized and reasonable suspicion.<sup>27</sup> In a similar

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24. *Winston v. Lee*, 105 S. Ct. 1611 (1985). Justice Blackmun recently decried the "Court's implication that the balancing test is the rule rather than the exception." *New Jersey v. T.L.O.*, 105 S. Ct. 733, 749 (1985) (Blackmun, J., concurring). See also Current Topic, *New Jersey v. T.L.O.: Misapplication of an Appropriate Standard*, 4 YALE L. & POL'Y REV. 141 (1986). Despite Justice Blackmun's protestations, the federal courts continue to broaden the scope of the fourth amendment balancing test. Random road blocks for drunk drivers serve as one recent example of judicial balancing. In *Delaware v. Prouse*, 440 U.S. 648 (1979), the Supreme Court overturned a Driving Under the Influence (DUI) conviction on the basis of a fourth amendment analysis. The Court advocated a fourth amendment construction designed "to safeguard the privacy and security of individuals against arbitrary invasions . . ." *Id.* at 654, quoting *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). However, the Court concluded that such random searches could be upheld if a minimal intrusion was balanced by a significant government interest and no comparable method of obtaining the public goal existed. More recently, several state courts have upheld local roadblocks under the *Prouse* standard. *State v. Garcia*, 481 N.E.2d 148 (Ind. Ct. App. 1985), *reh'g denied*, 489 N.E.2d 168 (1986); *Little v. State*, 479 A.2d 903 (Md. 1984). See generally Note, *Exploring the Constitutional Limits of Suspicionless Searches: The Use of Roadblocks to Apprehend Drunken Drivers*, 71 IOWA L. REV. 577 (1986) (suggesting that visual observation of motorists is an adequate substitute for random road blocks).

25. See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Davis*, 482 F.2d 893 (1973).

26. See *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1267 (7th Cir. 1976); *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985). Reasonable suspicion is defined in terms of a quantum of individualized evidence somewhere on a graded scale between complete randomness and probable cause. Significantly, reasonable suspicion requires some objective factors in place of mere inarticulate hunches. See *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875 (E.D. Tenn. 1986).

27. In *Allen*, an informer smoked marijuana with employees during work hours. *Allen v. City of Marietta*, 601 F. Supp. at 484.

case, the Seventh Circuit denied injunctive relief from a Chicago Transit Authority rule requiring drug and alcohol testing of bus drivers after a serious accident or other suspicious activity.<sup>28</sup> The court found dispositive the basing of the warrantless searches on both individualized evidence and society's compelling interest in the alertness of public bus drivers.<sup>29</sup> Lastly, in *Turner v. Fraternal Order of Police*,<sup>30</sup> the District of Columbia Court of Appeals held constitutional an agency policy of testing police and firefighters upon any suspicion. The court found that because drug use decreased alertness and impeded quick and decisive action, the preservation of public safety necessitated urinalysis testing. However, the court expressly read the District of Columbia's regulation to allow testing only on reasonable and objective factors, thereby reducing the risk of intrusion on the privacy rights of innocent employees.<sup>31</sup>

These three cases serve as part of a new core of drug testing law: in government employment situations directly affecting public safety, drug testing may be based on a quantum of individualized evidence which is less than would meet the constitutional standard of probable cause.<sup>32</sup> This relaxation of evidentiary requirements, however, is not a significant departure from settled search and seizure doctrine. Indeed, *Allen*, *Suscy*, and *Turner* merely elaborate on the analysis first promulgated in *Terry v. Ohio*.<sup>33</sup> *Terry* permitted, in certain cases involving a vital state interest, minimally intrusive searches based on evidence less compelling than probable cause.<sup>34</sup> These drug testing cases suggest that an urinalysis required on the basis of reasonable suspicion can be accurately perceived as a *Terry* stop, a quasi-search requiring less than full constitutional protections. This view is patently correct. From the reassessment begun in *Terry* flowed the notion that limited intrusions into fourth amendment privacy rights require a parallel limited justification.

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28. See *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d at 1267.

29. *Id.* at 1267.

30. 500 A.2d 1005 (D.C. 1985).

31. *Id.* at 1008.

32. But see *Jones v. McKenzie*, 628 F. Supp. 1500, 1509 (D.D.C. 1986) (approving only investigations predicated upon the higher evidentiary standard of probable cause).

33. 392 U.S. 1 (1968). In *Terry*, a Cleveland police detective spotted two men apparently 'casing' a store. Lacking probable cause, the officer nevertheless detained the suspects and frisked their outer clothing for weapons. The Supreme Court held that the search amounted to only a minor inconvenience and petty indignity. The majority upheld the police action, stressing the relative social significance of the search and the minimal individual intrusion.

34. While the level of intrusion of drug testing varies depending on the procedure, urinalysis testing generally engenders less humiliation and dislocation than body searches or investigations of residential premises. See generally *supra* note 22.

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Drug testing of government employees that is predicated upon reasonable suspicion falls under this doctrine. Consequently, the real difficulty lies in determining under what circumstances — if any — the government can institute suspicionless tests, which are significantly more likely to infringe upon constitutional rights of individuals.<sup>35</sup>

Major cases dealing with drug testing have wrestled with this question. With only one or two major exceptions,<sup>36</sup> the federal courts have consistently struck down random government testing of employees. However, the varying fact patterns of these cases have hindered comprehensive resolution of the constitutional issues.

Despite the distinguishing characteristics of these cases, certain analytical patterns emerge from these decisions; the federal courts have repeatedly insisted upon the dual application of due process requirements and of a reasonableness test drawing a rational nexus between the government program and social safety interests. In *McDonnell v. Hunter*,<sup>37</sup> for example, officials of the Iowa prison system, concerned with the smuggling of drugs to prisoners, instituted both a body search and a drug testing program for correctional facility officers. Even though as a practical matter employees were required to submit to testing only on articulable grounds, the district court faulted the prison system for the arbitrary and capricious failure to establish standards, give written notice, and provide clear testing guidelines.<sup>38</sup> The absence of these measures severely undermined the state's argument that the prison employees retained reduced subjective expectations of privacy.<sup>39</sup> More significantly, the court

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35. While law enforcement agencies may predicate testing on reasonable suspicion, this finding does not moot the question of whether the workplace serves as an appropriate setting for drug testing. Instead, it merely raises further issues of employment linkages and alternative solutions. See *infra* § IV.

36. See, e.g., *Committee for GI Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975). *Callaway* upheld random drug testing of military personnel. The compelling public interest in the readiness of the armed forces and the reduced expectation of individual privacy would have justified a decision allowing random investigation. However, the court's opinion was expressly based upon the unique spartan rigors of military life. "To strike the proper balance between legitimate military needs and individual liberties we must inquire whether 'conditions peculiar to military life' dictate affording different treatment to activity arising in a military context." *Committee for GI Rights v. Callaway*, 518 F.2d at 476, *quoting* *Carlson v. Schlesinger*, 511 F.2d 1327, 1331 (D.C. Cir. 1975). Indeed, a recent decision refused to extend *Callaway* to civilian security officers employed at Fort Stewart, Georgia. *American Fed'n of Gov't Employees v. Weinberger*, No. 86-353 (S.D. Ga. Dec. 2, 1986) (LEXIS, Genfed library, Dist. file).

37. 612 F. Supp. 1122 (S.D. Iowa 1985).

38. *Id.* at 1126. See also *Marshall v. Barlows, Inc.*, 436 U.S. 307, 323 (1978) (faulting OSHA for permitting unbridled discretion in the formulation of regulatory inspections).

39. Several courts have suggested that the method of drug testing may affect the level of intrusion. Failure to give notice, herding together of employees in a dehumaniz-

chastised the defendants for their failure to establish a rational nexus between the urinalysis and the goals of the program. "The possibility of discovering who might be using drugs and therefore might be more likely than others to smuggle drugs to prisoners is too far attenuated to make seizures of bodily fluids constitutionally reasonable."<sup>40</sup> In imposing a nexus requirement, the court implied that the government, in instituting a drug testing program, carries the burden of showing the existence of a causal relationship between suspicionless investigations and government goals. This requirement has created enormous evidentiary difficulties for proponents of non-cause intrusions.<sup>41</sup>

The district court's analysis in *Jones v. McKenzie*<sup>42</sup> closely tracks the pattern of *McDonell*. Amid reports of increased traffic accidents, growing absenteeism, and erratic employee behavior, the District of Columbia School Board initiated mandatory testing of all Transportation Section employees. Herded into a large room, the plaintiff and her colleagues were tested under an unconfirmed EMIT procedure.<sup>43</sup> Judge Oberdorfer, rejecting the school board's position, rebuked the government for both procedural laxness and the failure to harmonize the testing program with investigative goals. Because the testing encompassed all employees, not just drivers and mechanics,<sup>44</sup> the board could not establish a rational relationship between the scope of the investigation and the social safety goals; overbroad testing increased the chances of intrusion on privacy rights without substantially adding to public security.

Following the trail blazed by *Jones* and *McDonell*, the court in *Capua v. City of Plainfield* struck down mandatory testing of all local police

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ing manner, lack of confidentiality, and public observation of the private act of urination all add to the humiliation and degradation of the process. Conversely, effective procedural safeguards can minimize both employee expectations of privacy and employer arbitrariness. See, e.g., *Storms v. Coughlin*, 600 F. Supp. 1214, 1222 (S.D.N.Y. 1984) (suggesting that while random testing of prisoners was otherwise acceptable, the additional humiliation of public performance, when not compelled by any security or accuracy requirements, rendered such testing impermissible). See also *City of Palm Bay v. Bauman*, 475 So.2d 1322 (Fla. Dist. Ct. App. 1985) (repeating the trial court's assertion that random or mandatory testing as part of a yearly physical decreases the subjective and objective intrusion into privacy and daily life).

40. *McDonell v. Hunter*, 612 F. Supp. at 1130.

41. See *infra* § IV.

42. 628 F. Supp. 1500 (D.D.C. 1986).

43. For a description of the EMIT (Enzyme Multiplied Immunoassay Technique) test, see *infra* note 90.

44. For example, plaintiff Juanita Jones served as a school bus monitor; the defendants were unable to prove any causal link between drug use, the employment setting, and public safety.



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and firefighters.<sup>45</sup> Pointing out that no historic evidence supported the city's tale of public danger, Judge Sarokin chided the defendants for their failure to implement the safeguards of due process: adequate notice, minimum intrusion, and appropriate confidentiality standards. The court focused on several procedural failings, including the publicity surrounding the program, the highly intrusive nature of body surveillance, and the Fire Department's tactics of surprise and deception.<sup>46</sup> In addition, the same overbreadth problem that plagued the *Jones* program undermined the Plainfield procedures. Among those dismissed was a city communications officer whose position was not directly related to public safety. In sum, these cases demonstrate a consistent judicial concern that drug testing programs meet the twin requirements of the *Katz* standard: fair process to minimize the subjective expectation of privacy, and a relational nexus between specific government intrusions and the protection of important social interests.

Only one recent case bucks this trend. The holding of that case, *Shoemaker v. Handel*,<sup>47</sup> rests on distinguishing factual characteristics: the availability of notice, adequate procedural safeguards, and insured confidentiality.<sup>48</sup> In *Shoemaker*, several prominent jockeys challenged a policy of random testing administered by the New Jersey Racing Commission. The Third Circuit, affirming the district court's validation of the policy, pointed both to the procedural elements of confidentiality and to the highly circumscribed nature of the testing; no trainers, grooms, or track officials were needlessly tested.<sup>49</sup> Nevertheless, the grounds for affirmance appear inconsistent with the protection of privacy rights and social norms. While the safeguards of the program were surely admirable, these procedures alone could not satisfy the test of reasonableness. Consequently, the Third Circuit rooted its holding in the history of

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45. 643 F. Supp. 1507, 1522 (D.N.J. 1986).

46. On May 26, 1986, all firefighters and fire officers were ordered to submit to urinalysis testing. At 7:00 A.M. on May 26, the Plainfield Fire Chief and the Director of Public Affairs and Safety entered the fire station, locked all doors, and awakened the slumbering employees. Each firefighter was ordered to submit an urine sample produced under the watchful eyes of bonded testing agents. This procedure was repeated twice over the following two weeks. *Id.* at 1511.

47. 795 F.2d 1136 (3d Cir. 1986).

48. The Third Circuit correctly suggested that the right to privacy in medical information may be undercut by a compelling state interest. However, any access to medical records is severely circumscribed by need and confidentiality. See *Whalen v. Roe*, 429 U.S. 589 (1977); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570 (3d Cir. 1980).

49. *Shoemaker v. Handel*, 795 F.2d at 1143-44.

administrative regulation and the intense public interest in race course safety. Both bases are problematic.

First, the *Shoemaker* court suggested that the history of regulation substantially reduced the jockeys' reasonable expectation of privacy. While regulation of race betting standards may have been pervasive, nothing in the state's history of regulation anticipated suspicionless drug testing of jockeys. The Third Circuit pointed to some past testing, but the argument that postrace testing of horses created an expectation of similar invasion of human privacy seems ludicrous.<sup>50</sup> Such regulation could not reduce the jockeys' subjective expectation of privacy.<sup>51</sup> Second, the court failed to establish a nexus between drug use and safety. Assuming that drugs may impair motor coordination and pose a danger in a fast-paced sport, the state, at trial, was unable to point to any actual incidents of injury due to drug or alcohol abuse.<sup>52</sup> Administrative law on non-cause searches suggests that random testing is impermissible if a less intrusive remedy exists;<sup>53</sup> constitutional norms require the use of the least intrusive remedy. In *Shoemaker*, self-policing and self-education of jockeys with respect to the dangers of riding and substance abuse served as adequate substitutes for drug testing. In the absence of a breakdown of this system, the compelling state interest justifying intervention appears strikingly weak.

The implications of these few cases may be easily summarized. Suspicionless drug testing is permissible under certain severely lim-

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50. *Id.* at 1138.

51. While the issue of subjective expectations often acts as a barrier to state action, the controlling inquiry generally remains a social rather than an individual judgment of the reasonableness of a privacy interest. See *Hudson v. Palmer*, 468 U.S. 517, 525 n.7 (1984); *Blackburn v. Snow*, 771 F.2d 556, 563 (1st Cir. 1985) (quoting Professor Amsterdam), "[A subjective expectation of privacy] can neither add to, nor its absence detract from, an individual's claim to Fourth Amendment protection." Amsterdam, *supra* note 10, at 384. While reduced expectations alone cannot justify government intrusion, Amsterdam's view neglects the cohesive nature of the two-part *Katz* analysis. Adequate notice or appropriate procedures alone may never justify government intrusion, but the absence of acceptable standards diminishes a state's claim of reasonableness. These procedural aspects clearly have a greater impact on individual than on social expectations. See, e.g., *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986).

52. See *Shoemaker v. Handel*, 619 F. Supp. 1089 (D.N.J. 1986), *aff'd*, 795 F.2d 1136 (3d Cir. 1986).

53. See *Camara v. Municipal Courts*, 387 U.S. 523, 537 (1967). Cf. *Florida v. Royer*, 460 U.S. 491, 499-500 (1983) (articulating doctrine of requiring least intrusive alternative in the criminal sphere). The *Shoemaker* court's reliance on the entire body of administrative search case law seems somewhat misplaced. The greater latitude to conduct warrantless searches of businesses reflects the lesser expectation of privacy in commercial than in individual property. See *Donovan v. Dewey*, 452 U.S. 594, 598 (1981); *Id.*, 452 U.S. at 608 (Rehnquist, J., dissenting); *United States v. Biswell*, 406 U.S. 311, 316 (1972).

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ited circumstances. First, to minimize disruption of individual expectations, drug testing must follow adequate notice, and must be carried out confidentially and in accordance with written, published procedures. Second, a nexus test sets the parameters mandated by the second prong of *Katz*: the social utility of drug testing only outweighs the individual intrusion under circumstances clearly manifesting an important and overarching public interest, proven causal links between each testing category, and improved agency functioning stemming from decreased narcotics use. However, courts have only begun to define applicable standards. The next section examines several hurdles that government agencies face in meeting this nexus requirement.

### IV. *The Nexus Test and the Limited Utility of Urinalysis Data*

In theory, the value of drug testing lies in its ability to ensure the safety and security of the public. More clearly, the basis for random testing rests upon a widely held and superficially reasonable belief that the use of controlled substances in the workplace poses a significant threat to the public. This supposed causal relationship between drug use and employment dysfunction is the condition precedent for any non-cause intrusion into government employees' fourth amendment rights. While the connection between testing and safety is often accepted without much debate, it is open to several lines of attack. First, the mechanics of drug testing are often inaccurate, suggesting that indications of drug use cannot be linked reliably with employment dysfunction and public safety. Second, a positive result on an urinalysis sample does not by itself constitute dispositive evidence that drug use impairs on-the-job employee performance. Third, the often unquestioned assumption that drug use in the workplace creates hazards is largely supported only by intuition, and not by relevant empirical data. Consequently, drug testing often proves ineffective in enforcing social norms and, indeed, is often unnecessary given the efficacy of self-policing and self-help policies.

The mechanics of drug testing procedures are frequently attacked as imprecise. The prevalence of false positives and false negatives has undermined the reputation of urinalysis programs.<sup>54</sup> While much doubt has been raised about the reliability of the EMIT proce-

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54. See Altman, *Drug Tests Gain Precision, But Can Be Inaccurate*, N.Y. Times, Sept. 16, 1986, at A17, col. 1.

ture,<sup>55</sup> confirmation with gas chromatography plus mass spectrometry (GS/MS), while expensive, is widely considered to be authoritatively accurate.<sup>56</sup> However, the less publicized problem of laboratory quality control may even surpass the reliability issues in significance. The tedium and complexity of processing thousands of roughly identical urine specimens creates enormous opportunities for human error. In the spring of 1985, investigators for the Centers for Disease Control in Atlanta reported a crisis not in drug use but in drug testing. A random survey of thirteen commercial laboratories revealed grossly defective procedures.<sup>57</sup> These findings mirror results of earlier studies.<sup>58</sup> The combination of inaccurate tests and deficient testing raises severe credibility problems for suspicionless searches.

Second, drug traces linger in the blood stream long after behavioral effects have disappeared. Unlike alcohol, THC metabolites produce enzymes that can be detected for three days at a minimum.<sup>59</sup> An employee consuming illicit narcotics on a Friday evening may test positive on Monday morning despite the absence of any continuing influence. While some recent studies suggest that impairment of complex cognitive and behavioral functions may last longer than commonly supposed,<sup>60</sup> it is clear that drug traces outlast narcotic effect. Thus, positive reaction to a drug test may have

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55. For a further description of the EMIT test, see *infra* note 90. The EMIT method is very sensitive and rarely produces false negatives; studies do confirm an approximately 10% false-positive rate. See Morgan, *Problems of Mass Urine Screening for Misused Drugs*, 16(4) J. OF PSYCHOACTIVE DRUGS 305, 312 (1984); Oellerich, Kulpman & Haeckel, *Drug Screening by Enzyme Immunoassay (EMIT) and Thin-Layer Chromatography (Drug Skreen)*, 15 J. OF CLINICAL CHEMISTRY AND CLINICAL BIOCHEMISTRY 275 (1977).

56. The failure to confirm test results constitutes a denial of due process. Both the Army and Navy testing programs experienced numerous problems from confirmation failure. The use of the same test for both confirmation and finding and the employment of multiple unreliable tests created a significant error rate. Indeed, thousands of positive reports were erased from military records due to inconclusive testing procedures. See Morgan, *supra* note 55, at 313.

57. See Altman, *supra* note 54, at A17. The study found acceptable reporting in 1 of 11 labs testing for barbiturates, 0 of 12 for amphetamines, 6 of 12 for methadone, 1 of 11 for cocaine, 2 of 13 for codeine, and 1 of 13 for morphine. See also Hanson, Caudill & Boone, *Crisis in Drug Testing, Results in CDC Blind Study*, J. A.M.A. 2382 (1985). But see Adams & Remmers, *supra* note 4, at 330 n.102 (1986) (arguing that findings of the study could not be reasonably applied to well-funded private testing facilities).

58. See, e.g., Lundberg, *Urine Drug Screening: Chemical McCarthyism*, 287 NEW ENG. J. OF MED. 723 (1972).

59. See Cohen, *Drugs in the Workplace*, 45 J. CLIN. PSYCHIATRY 4, 5 (1984). THC is tetrahydrocannabinol, the psychoactive component of marijuana.

60. See Yesavage, Leirer, Denari & Hollister, *Carry-Over Effects of Marijuana Intoxication on Aircraft Pilot Performance: A Preliminary Report*, AM. J. PSYCHIATRY 1325 (1985) (studying negative effects of marijuana use on pilot performance in calibrated flight simulators).

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no bearing on employment dysfunction.<sup>61</sup> Consequently, the nexus between drug use, employment disability, and public safety may not exist even with an accurate urinalysis.<sup>62</sup>

Third, it is not altogether clear that drug use impairs work functioning. Some researchers have contended that there is no proven correlation between drug abuse and observed employment behavior.<sup>63</sup> Basing their argument on medical investigations, these analysts conclude that "urine screening is a probe to identify deviance, not dysfunction — a technique to investigate humans, not accidents."<sup>64</sup> While the point may be overstated — drug use appears to have at least a short-term deleterious effect on motor coordination and judgment<sup>65</sup> — the conclusion is nonetheless instructive. Relevant empirical data often leave unsupported the basic assumptions made by administrators and courts about employment dysfunction and narcotics use. The burden of proof must necessarily lie with the government where any diminution of constitutional rights is involved; consequently, the difficulties of demonstrating an adequate link between drug use and public safety require the limitation of random urinalysis testing to the few circumstances where it can be justified by a compelling safety interest.

Finally, many testing programs are predicated only on the theoretical potential for harm stemming from drug use among employees, rather than on any demonstrable damage.<sup>66</sup> This justification for random searches flows from an assumption that only non-cause intrusions can effectively ensure universal compliance with important social norms.<sup>67</sup> However, the social cost of suspicionless inva-

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61. See *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986). Of course, this factor may have less relevance to public employees such as military and medical personnel, who are on essentially permanent call.

62. While the government retains an interest in the control of illegal activities, the workplace is certainly not the appropriate forum for elaborate criminal investigations. Legal and social norms militate against disadvantaging government employees under the criminal law. See *United States v. Kahan*, 350 F. Supp. 784, 793 (S.D.N.Y. 1972) (dictum), *aff'd in part, rev'd in part*, 479 F.2d 290 (2d Cir. 1973); *rev'd per curiam*, 415 U.S. 239 (1974). Job-related crime can be most effectively and fairly handled by normal investigative procedures designed to minimize the intrusion on innocent coworkers.

63. See *Morgan*, *supra* note 55, at 306. The *Morgan* study cites reports that suggest drug use under some circumstances may enhance productivity. See Helms, *Cocaine: Some Observations on its History, Legal Classifications and Pharmacology*, 4 CONTEMP. DRUG PROBLEMS 175 (1975) (citing increased productivity among ancient Peruvian miners); RUBIN & COMITAS, *Ganja in Jamaica: A Medical and Anthropological Study of Chronic Marijuana Use* (1975) (studying the beneficial effects of marijuana use on modern Jamaican workers).

64. *Morgan*, *supra* note 55, at 306.

65. See *Cohen*, *supra* note 59, at 4.

66. See, e.g., *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986).

67. See *Camara v. Municipal Court*, 387 U.S. 523, 536 (1967).

sions of the privacy of citizens subtracts from the value of public programs; non-random procedures that realize the same gain and prevent the same harm as suspicionless testing are legally and socially preferable. Consequently, non-cause searches are only justifiable in situations evidencing a lack of potential substitutes.<sup>68</sup> This is seldom the case with drug testing, for two reasons. First, policies that are less intrusive than urinalysis programs, such as educational and rehabilitative projects, or other means of employee self-help, are often successful.<sup>69</sup> Second, employer investigations often uncover reasonable suspicion without ever raising fourth amendment issues.<sup>70</sup> Visual inspection may reveal the damaging effects of drug use; this type of search minimizes the need for more intrusive random searches.<sup>71</sup> The long-term relationship created by government employment vitiates the necessity for quick-fix solutions and distinguishes the drug testing issue from the patchwork searches unavoidably applied at borders and airports. Indeed, curtailment of suspicionless testing hardly deprives the employer of all weapons in the fight against drugs, but merely forces the use of equally effective but less intrusive methods.

In sum, by ignoring the success of self-policing efforts and the potential effectiveness of non-intrusive educational or investigative programs, government agencies have subverted constitutional norms to gain little or nothing in the coinage of public safety. Basic liberties cannot be sacrificed at the altar of attenuated and marginal risks. Given the absence of any compelling interest in minimizing an existing danger to society, the fourth amendment balance inevi-

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68. See *Camara* at 534-39 (provisions of housing code could only be credibly enforced through physical inspections of premises); *Delaware v. Prouse*, 440 U.S. 648, 659 (1970) ("Given the alternative mechanisms available, both those in use and those that might be adopted, we are unconvinced that the incremental contribution to highway safety of the random spot check justifies the practice under the Fourth Amendment"; e.g., visual enforcement of traffic rules achieves safety goals without unnecessary intrusion).

69. Indeed, benign neglect may be just as effective as other forms of social control. In some areas, peer pressure among employees may provide adequate safeguards against drug use in the workplace. See *New Law to Combat Drugs: Words, Deeds and Political Expediency*, N.Y. Times, Oct. 27, 1986, at A18, col. 2 (citing a growing consensus among drug law-enforcement officials that education — and not other more heavily-funded programs — is the most effective means of fighting drug abuse. However, congressional and bureaucratic politics often militate for projects more amenable to splashy media coverage).

70. See *Allen v. City of Marietta*, 601 F. Supp. 482, 484 (N.D. Ga. 1985).

71. See generally *Adams & Remmers*, *supra* note 4, at 339 (analyzing the pros and cons of various investigative measures).

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tably tilts towards individual liberties.<sup>72</sup> Constitutional testing programs may only be instituted in situations where the present and precise risks posed by employee drug use are clearly spelled out.

### V. *Turning the Tables: Government Defenses Against Privacy Claims*

Although social and legal factors militate against widespread acceptance of suspicionless drug testing, the courts will nonetheless over the next few years be inundated by government employee suits challenging such testing. Existing cases follow predictable patterns, but public agencies will in the future certainly raise new and credible defenses against fourth amendment claims. Many potential defenses find credence in existing case law and social policy; however, while the courts will have to elaborate on such matters as the requirements of a justiciable search and the role of consent in an employment relationship, for reasons enumerated below, the basic balance of the fourth amendment test will remain unaltered.

#### A. *The Search Requirement*

Part of the debate over drug testing swirls around the issue of whether an urinalysis actually constitutes a search within the scope of the fourth amendment. The Supreme Court has defined a search as an infringement of a reasonable expectation of privacy,<sup>73</sup> and a seizure as a meaningful interference with an individual's possessory interest in property.<sup>74</sup> Most courts have dealt summarily with the question, simply assuming that a drug test constitutes a justiciable search<sup>75</sup> or, in one case, a seizure.<sup>76</sup> Only a solitary concurrence in

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72. See generally Note, *Individualized Suspicion in Factory Searches — The "Least Intrusive Alternative"*, 21 AM. CRIM. L. REV. 403 (1984) (discussing constitutional requirement of least intrusive strategy).

73. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *Smith v. Maryland*, 442 U.S. 735, 739-741 (1979); *Terry v. Ohio*, 392 U.S. 1, 9 (1967).

74. *United States v. Jacobsen*, 466 U.S. at 113; *United States v. Place*, 462 U.S. 696 (1983); *Texas v. Brown*, 460 U.S. 730, 747 (1983) (Stewart, J., concurring). Traditionally, this element of the fourth amendment applied to the taking of property or, alternatively, to the infringement of the freedom of movement. See *Michigan v. Summers*, 452 U.S. 692, 696 (1981); *Reid v. Georgia*, 448 U.S. 438, 440 (1980) (per curiam).

75. See *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir. 1986) (supporting the proposition that employee drug tests fall within the jurisdictional reach of the search and seizure clause); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986); *McDonell v. Hunter*, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985); *Allen v. City of Marietta*, 601 F. Supp. 482, 488-89 (N.D. Ga. 1985); *Storms v. Coughlin*, 600 F. Supp. 1214, 1218 (S.D.N.Y. 1984); *City of Palm Bay v. Bauman*, 475 So.2d 1322 (Fla. Dist. Ct. App. 1985). See also *Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (taking fingernail scrapings constitutes a search under fourth amendment); *Schmerber v. California*, 384 U.S. 757 (1966) (blood tests violate reasonable expectation of privacy); *Burnett v. Municipality of Anchorage*, 634 F. Supp. 1029 (D. Alaska 1986) (breathalyzer testing of suspected drunk

*Turner v. Fraternal Order of Police* has seriously suggested that random urinalysis testing fails to raise constitutional issues.<sup>77</sup>

Despite the relative isolation of that single opinion, the argument that drug testing falls outside the scope of the fourth amendment appears well grounded in recent Supreme Court jurisprudence.<sup>78</sup> Two recent cases lend support to this position. In *United States v. Place*,<sup>79</sup> the Drug Enforcement Agency conducted a sniff test of luggage, using dogs trained to detect the presence of illegal narcotics. While the case was ultimately decided on other grounds,<sup>80</sup> dicta in the majority opinion suggested that the sniff test raised no cognizable privacy or property interest. The Court reasoned that no legitimate possessory right could be found in the single issue of the presence or absence of drugs or other contraband items.<sup>81</sup> This analysis was more fully developed in *United States v. Jacobsen*.<sup>82</sup> In *Jacobsen*, employees of Federal Express searched an unclaimed package; they found — inside carefully wrapped tubing — a suspicious white powder.<sup>83</sup> FBI agents, summoned to the scene, conducted without a search warrant a field test of the exposed substance. Not surprisingly, the test proved positive and the cocaine was confiscated. The majority concluded that the field test did not itself con-

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drivers raises fourth amendment issues). *But see* *State v. Locke*, 418 A.2d 843 (R.I. 1980) (results of breathalyzer test admissible as reasonable search and seizure); *Davis v. District of Columbia*, 247 A.2d 417 (D.C. 1968) (urine specimen admissible as voluntarily given). *But cf.* *United States v. Mara*, 410 U.S. 19 (1973) (handwriting analyses do not fall within purview of fourth amendment); *United States v. Dionisio*, 410 U.S. 1 (1973) (taking voice exemplars does not violate any reasonable expectations of privacy).

76. *See McDonell v. Hunter*, 612 F. Supp. at 1127. While no one would suggest that a person possesses a continuing property interest in disposed bodily fluids, the *McDonell* court argued that an urinalysis test interferes with private physiological data. However, a properly processed test may not necessarily generate extraneous information.

77. 500 A.2d 1005, 1011 (D.C. 1985) (Nebeker, J., concurring) ("[W]e must first consider whether a police officer holds a subjective expectation of privacy in his body waste . . . . An individual cannot retain a privacy interest in a waste product that, once released, is flushed down the drain."). *See also* *Burnett v. Municipality of Anchorage*, 634 F. Supp. at 1035.

78. Judge Nebeker's concurrence in *Turner* apparently did not rely on recent developments in the law but rather on more intuitive assumptions about the proper functioning of the fourth amendment and the sewage system.

79. 462 U.S. 696 (1983).

80. The sniff test was struck down on the grounds that the detention of the luggage constituted an unreasonable seizure of property. *Id.* at 710.

81. *Id.* at 707. Justice O'Connor asserted, rather unconvincingly, that the opinion of the Court was severely limited; the sniff test was *sui generis*. In *Jacobsen*, Justice Brennan faulted both the Court's imagination and knowledge in asserting that the sniff test was unique. *United States v. Jacobsen*, 466 U.S. at 136 (Brennan, J., dissenting).

82. 466 U.S. at 109.

83. The search by the Federal Express employees fell under the category of private search and, consequently, slid outside the scope of the fourth amendment. *See, e.g.* *Burdeau v. McDowell*, 256 U.S. 465 (1921).



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stitute a search; because the drug analysis could only reveal the presence or absence of a controlled substance,<sup>84</sup> the actions of the FBI could not, according to the Court, “compromise any legitimate interest in privacy.”<sup>85</sup> Although the majority eventually waffled in its reasoning,<sup>86</sup> the implications emerged clearly: investigational procedures that only reveal the existence of illegal actions fall outside the scope of the fourth amendment.

Justice Brennan, in a blistering dissent, attacked the logic of the majority opinion.<sup>87</sup> Arguing that the Court foreclosed any consideration of the circumstances, Brennan charged that the decision “may very well have paved the way for technology to override the limits of law.”<sup>88</sup> Furthermore, Justice Brennan argued that the fundamental nature of the fourth amendment dictated a position contrary to the majority’s view. According to Brennan, *Katz* and its progeny stand for the distinct proposition that reasonable expectations of privacy in personal effects and information — rather than enumerated areas — create an impenetrable zone that the police cannot violate absent probable cause.<sup>89</sup>

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84. These supposedly exact tests are often flawed. See *Doe v. Renfrow*, 475 F. Supp. 1012 (N.D. Ind. 1979), modified, 631 F.2d 91 (7th Cir. 1980), cert. denied, 451 U.S. 1022 (1981). During a school-wide sniff-down, a trained dog registered possession on a 13-year old girl. After she emptied her pockets to no avail, school administrators ordered a strip search. Again no drugs were found, but later it was learned that the student had been playing that morning with a dog in heat. In total, 2,780 innocent students were subjected to a potentially frightening and obviously degrading investigative procedure. Thirty-five students were wrongly suspected of possessing contraband. See *Doe v. Renfrow*, 631 F.2d at 95 (Fairchild, C.J., dissenting).

85. See also *United States v. White*, 766 F.2d 1328, 1331 n.3 (9th Cir. 1985) (distinguishing between tests that only establish the existence or non-existence of controlled substances and investigative procedures with multiple variables).

86. “To the extent that a protected possessory interest was infringed, the infringement was *de minimis* and constitutionally reasonable.” *United States v. Jacobsen*, 466 U.S. at 126. The opinion left unclear whether this passage applied only to the minute destruction of powder during the field test or to the entire process.

87. 466 U.S. at 133-43 (Brennan, J., dissenting).

88. 466 U.S. at 137-38. As an example, Justice Brennan suggested that under the majority opinion, law enforcement officials could release trained cocaine-sensitive dogs (“canine cocaine connoisseurs”) to roam the streets, sniffing at will. Cf. *People v. Evans*, 65 Cal. App. 3d 924, 932, 134 Cal. Rptr. 436, 440 (1977). See also *United States v. Venema*, 563 F.2d 1003 (10th Cir. 1977) (arguing that bomb sniff tests do not trigger any constitutional safeguards).

89. 466 U.S. at 139-40. See also *United States v. Ross*, 456 U.S. 798, 822-23 (1982) (“[the] Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view”); *United States v. Chadwick*, 433 U.S. 1, 11 (1977) (“[n]o less than one who locks the doors of his home against intruders, one who safeguards his possessions is due the protection of the Fourth Amendment”).

The reasoning of *Jacobsen* and *Place* potentially applies to urinalysis drug testing.<sup>90</sup> Ignoring the accuracy problems of narcotic detection programs,<sup>91</sup> such testing arguably reveals only the presence or absence of drug use and consequently falls outside the definition of a search constructed by the *Jacobsen* majority.<sup>92</sup> While such a finding may end the constitutional argument before it is even started, the answer is really not so simple. Two points confirm this. First, as Justice Brennan asserts, the fourth amendment establishes a fundamental protective layer which cannot be breached without invoking the procedural safeguards of the Bill of Rights.<sup>93</sup> Inherent in the fourth amendment is the right to be left alone, to ward off the prying eyes of the state. Accurate and confidential drug testing is less intrusive than more traditional forms of search and seizure, but that intrusion nonetheless betrays legitimate individual and social expectations of privacy.<sup>94</sup> Second, even assuming that the state action does not transgress social notions of legitimate privacy, the govern-

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90. It is not quite clear whether the standard urinalysis fits the *Jacobsen* model. In particular, the accuracy of urinalysis programs and the Enzyme Multiplied Immunoassay Technique (EMIT) — the most popular form of testing — has been questioned. Data suggest that the EMIT test, instead of revealing the presence or absence of drug use, often inadvertently produces false positives, passive use errors, and inaccurate results due to non-controlled medications and even medical impairments such as epilepsy. See *Jones v. McKenzie*, 628 F. Supp. 1500, 1505-06 (D.D.C. 1986); *McDonell v. Hunter*, 612 F. Supp. 1122, 1130 (S.D. Iowa 1985) (arguing that drug tests might yield a wealth of private information; in the court's view, this type of 'hope' search — frequently employed by King George III — inspired the fourth amendment). See also Divoli and Greenblatt, *The Admissibility of Positive EMIT Results as Scientific Evidence: Counting Facts, Not Heads*, 5 J. OF CLINICAL PSYCHOPHARMACOLOGY 114-16 (1985) (attacking the courtroom use of the EMIT test). But see Cohen, *supra* note 59, at 4-8 (1984) (defending the value and accuracy of confirmed urinalysis testing). Since no technology is 100% accurate, courts might conclude that confirmed drug tests fit the *Place* investigative mold.

91. Clearly, if government testing reveals information beyond mere drug use, then the fourth amendment is legally invoked. One should question a procedure that can only be constitutionally suspect after all the data accumulates.

92. But see *Burnett v. Municipality of Anchorage*, 634 F. Supp. 1029, 1035-37 (D. Alaska 1986). In deciding that a breath sample constituted a cognizable search, the *Burnett* court chose to rely on the language of *Schmerber* instead of the more recent decision in *Jacobsen*.

93. The gradual erosion of the zone test does not obviate this point. While the provisions of the fourth amendment are now more properly invoked by flexible notions of social privacy rights rather than by textual distinctions, the ultimate constitutional protections are no less fundamental than they were before *Katz*. See *supra* § II.

94. For an exposition of privacy as a fundamental element of liberty, see Fried, *Privacy*, 77 YALE L.J. 475 (1968). To Fried, "privacy is not simply an absence of information about us in the minds of others; rather it is the control we have over information about ourselves." *Id.* at 482. Monitoring alters relationships in a subtle way, but it still strips away from an individual control over his or her environment. *Id.* at 491. Charles Fried is now Solicitor General of the United States and is likely to be arguing the contrary if the drug testing issue reaches the Supreme Court.

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ment compulsion disturbs the flow of daily life.<sup>95</sup> While the humiliation and degradation of providing urine samples is both debatable and variable, disagreement over this cannot alter the fact that sovereign authority has, by requiring drug tests, interfered with the actions of the innocent as well as the guilty, with the abstainers as well as the abusers.<sup>96</sup> To permit such state action to proceed without any judgment of the relative value of the procedure and the weight of the intrusion vitiates the intent of the fourth amendment to limit the authority of the government to disrupt the personal lives of the citizenry.

### B. *The Puzzle of Consent*

Pre-employment consent to drug testing presents another unresolved legal issue.<sup>97</sup> While the novelty of agency testing leaves this argument still largely undebated, over the next few years government agencies will no doubt predicate their right to conduct drug testing programs on pre-employment contractual waivers of fourth amendment privacy rights.

Fourth amendment privacy rights may be waived under circumstances in which voluntary consent to a search or seizure is clear.<sup>98</sup> The voluntariness of the waiver must be measured under a "totality of the circumstances" standard.<sup>99</sup> The law on consent may influ-

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95. This theory might bring drug urinalysis testing closer to a seizure than a search. See generally *Cupp v. Murphy*, 412 U.S. 291 (1973). In fact, suspicionless drug testing is distinguishable from the *Jacobsen* procedure on this basis. Government investigations can raise fourth amendment issues on two levels: a seizure that brings the individual into the government's grasp, and the subsequent search. *United States v. Dionisio*, 410 U.S. 1, 8 (1973). In *Jacobsen*, the search followed on the back of a private seizure. Thus, this element of state action could not raise constitutional issues. The government compulsion forcing drug testing would, however, create seizure issues. This reading of *Jacobsen* would, of course, limit the case almost exclusively to its facts.

96. See Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983). Loewy agrees with the *Jacobsen* majority that the fourth amendment should only protect innocent people but suggests that searches like drug testing tend to reel in the innocent as well as the guilty. *Id.* at 1246-47.

97. But see *Patchogue-Medford Congress of Teachers v. Board of Educ.*, 505 N.Y.S.2d 888, 889 (App. Div. 1986) (predicating the entire discussion on the absence of any contractual consent).

98. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973); *Vale v. Louisiana*, 399 U.S. 30, 35 (1970).

99. *Schneckloth v. Bustamonte*, 412 U.S. at 248-49. In *Schneckloth*, a divided court wrestled with the question of whether consent to a fourth amendment search was governed by the 'knowing' and 'intelligent' standard of *Johnson v. Zerbst*, 304 U.S. 458 (1937). Contending that the search and seizure issue did not raise equivalent constitutional concerns of fairness of trial, the majority indicated that "there is no likelihood of unreliability or coercion present in a search-and-seizure case." *Schneckloth v. Bustamonte*, 412 U.S. at 242, quoting *Linkletter v. Walker*, 381 U.S. 618, 638 (1965). Because consent searches originated in common and acceptable police practices, the strict

ence drug testing in two ways: defining consent as a voluntary waiver of rights and allowing implied consent as a fictional or statutory declaration of waiver. While the theory of consent often stands as an independent doctrinal analysis in fourth amendment cases, in reality the two-tiered consent analysis simply tracks the bifurcated analysis of *Katz*.

Consent cases focus on valid and voluntary waivers of constitutional rights. The paradigmatic consent case, *Schneckloth v. Bustamonte*, involved a search of an automobile for contraband. Without first warning the occupants of the car of their fourth amendment right of refusal, the police sought permission to search the interior of the automobile. After the driver acquiesced,<sup>100</sup> the police discovered stolen checks in the trunk.<sup>101</sup> Although the majority opinion suggested that the consent issue required analysis outside the *Katz* paradigm, the theory of consent actually fits neatly into a general fourth amendment analysis. By definition, the person who waives a certain right and consents to a search no longer retains a subjective expectation of privacy. Thus, consent searches may be conducted pursuant to the first element of the *Katz* standard.

The theory of implied consent, however, is more likely to be invoked in support of a government drug testing program. This theory has roots in the companion cases of *Zap v. United States*<sup>102</sup> and *Davis v. United States*.<sup>103</sup> In *Zap*, a businessman, contracting to perform experimental work with the Navy, signed a form permitting random search of records and returns by the federal government. In 1942, FBI agents audited the books over Zap's heated protests; eventually, the search revealed a fraudulent check. The Court held

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standard of waiver afforded to criminal defendants need not extend to the fourth amendment. In dissent, Justice Brennan decried a practice permitting the waiver of "something as precious as a constitutional guarantee without [the accused] ever being aware of its existence." *Schneckloth* at 277 (Brennan, J., dissenting).

100. The reply in this case was the relatively unambiguous "Sure, go ahead." *Schneckloth* at 220. Consent cases often revolve around the actual language of the alleged waiver. *Id.* at 289 (Marshall, J., dissenting).

101. See also *Bumper v. North Carolina*, 391 U.S. 543 (1968); *Lewis v. United States*, 385 U.S. 206 (1966); *On Lee v. United States*, 343 U.S. 747 (1952). Since large-scale government programs are unlikely to be based upon immediate express permission, drug testing cases probably will not raise these consent issues. However, if this type of conversation between employer and employee occurs, *Schneckloth* makes clear that the government agency does not carry the burden of warning employees of their constitutional rights. *But cf.* *City of Palm Bay v. Bauman*, 475 So.2d 1322, 1324-25 (Fla. Dist. Ct. App. 1985) (holding that threat of disciplinary action on the part of the government vitiated the validity of signed consent forms). See also *McDonell v. Hunter*, 612 F. Supp. 1122, 1131 (S.D. Iowa 1985).

102. 328 U.S. 624 (1946).

103. 328 U.S. 582 (1946).

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that Zap voluntarily consented to the search.<sup>104</sup> The facts of *Davis* run parallel. Davis served as president of a corporation operating a gasoline filling station; the company was suspected of black marketing gasoline during the reign of government rationing. After undercover agents purchased petroleum from Davis without the requisite coupons, they demanded and gained — over Davis' protests — access to the company's store of coupons. The agents claimed the authority to search on the ground that the coupons legally remained the property of the Office of Price Administration.<sup>105</sup> Again, the Court upheld the action on a voluntary waiver theory. *Zap* and *Davis*, however, cannot rest on actual consent. Factual reconstruction suggests that neither Zap nor Davis formed any lasting intent to waive their fourth amendment rights, and that the searches thus were not voluntary. However, in light of the rational relationship between the business contract and the social acceptance of regulatory searches, the two cases can be seen as precursors of the modern balancing test and as parents of the doctrine of implied consent.

The theory of implied consent does not require actual voluntary acceptance. Instead, the doctrine — in the presence of contractual or statutory waivers — entails weighing the competing interests memorialized in the document and the circumstances, and substituting a social balancing test for the original negotiation of contract rights.<sup>106</sup> Since waivers of constitutional rights are generally disfavored, pre-employment contract clauses, instead of settling any legal dispute, merely set the stage for judicial interpretation of employer and employee welfare. The leading employment case in this area is *Pickering v. Board of Education*.<sup>107</sup> *Pickering* involved a school teacher's purported waiver of first amendment rights as a precondition to employment. After publication of his letter attacking the School Board's handling of a bond referendum, Pickering was dis-

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104. "[W]hen petitioner, in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts." *Zap*, 328 U.S. at 628.

105. *Davis*, 328 U.S. at 586.

106. Another aspect of implied consent theory emanates from statutory waivers. See *Burnett v. Municipality of Anchorage*, 634 F. Supp. 1029 (D. Alaska 1986) (upholding waiver of right to refuse breathalyzer test for all state drivers). In such cases, however, the validity of the statutory waiver turns upon competing individual and social interests. See also *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (suggesting that the government, even in defining a property right, may not unreasonably deprive an employee of certain inherent constitutional privileges).

107. 391 U.S. 563 (1968).

missed for actions impugning the reputation of the Board.<sup>108</sup> Weighing the individual interest in free speech and the School Board's natural desire for employee discipline, the Court concluded that the personal interest in free speech outweighed the competing state interests.<sup>109</sup> The Supreme Court's analysis of implied consent devolved into a mere test of reasonableness.<sup>110</sup> Applied to fourth amendment jurisprudence, the *Pickering* standard permits contractual waiver if the search is, under the circumstances, reasonable.<sup>111</sup> Of course, this merely restates the basic search and seizure balancing test. Consequently, it would appear that pre-employment contractual consent adds little to the government's defense of random employee drug testing.<sup>112</sup>

#### VI. *The Federal Testing Program: The Nexus Applied*

The constitutional restrictions imposed by the fourth amendment create substantial legal difficulties for existing government programs; despite Justice Department protestations to the contrary, the recently unveiled federal plan should soon flounder against both legal and social policy attacks.

On September 15, 1986, President Reagan issued an executive order instituting a federal drug testing program permitting non-

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108. The Illinois Supreme Court affirmed the dismissal on the grounds that acceptance of the job obligated Pickering to refrain from protected speech. *Pickering v. Board of Educ. Township High School Dist. 205*, 36 Ill.2d 568, 225 N.E.2d 1 (1967).

109. Cf. *First Alabama Bank of Montgomery v. Donovan*, 692 F.2d 714, 720 (11th Cir. 1982) (permitting contractual consent to Department of Labor compliance reviews but only to those reviews deemed reasonable under the fourth amendment). See also *McDonnell v. Hunter*, 612 F. Supp. at 1130. While first amendment and sixth amendment rights may be more closely protected against unreasonable waiver, the little existing law on implied consent to searches more or less adheres to existing case law on waiver.

110. See also *Keyishian v. Board of Regents*, 385 U.S. 589, 605 (1967) ("[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected").

111. In this sense, the *Pickering* test reflects the theory of administrative search law. See *Camara v. Municipal Court*, 387 U.S. 523 (1967) (upholding routinized inspections for housing code violations). See also *Donovan v. Dewey*, 452 U.S. 594 (1981) (authorizing non-cause searches of mine operations); *United States v. Biswell*, 406 U.S. 311 (1972) (permitting inspections of firearms dealers); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (accepting random searches of liquor licensees); See v. *City of Seattle*, 387 U.S. 541 (1967) (authorizing fire inspections of warehouses). Compare *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (rejecting OSHA searches of almost all regulated workplaces). These cases suggest that regulatory searches are acceptable only where the intrusion is socially justifiable. The objective notion of waiver plays only a minor role in the balancing tests.

112. On the other hand, pre-employment waiver adds to notice to employees and reduces subjective expectations of privacy. The social judgment of the relative merits of individual and public interest would, however, seem unaltered.

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cause urinalysis for all employees occupying 'sensitive' positions.<sup>113</sup> Contending that drug use on and off the job poses serious hazards to both federal employees and the general public, the President authorized a program designed to eliminate drug abuse in the federal workplace.<sup>114</sup> On one level, the new Administration project is an admirable step forward from previous government testing programs. The program states procedural and notice requirements strictly; sixty-day fair warning, production of collateral medical documentation, and specific procedures for confidential and private re-testing are all guaranteed.<sup>115</sup> Several flaws, however, undermine the President's program. Despite the procedural safeguards designed to minimize the subjective expectation of privacy, the program is unconstitutional.

In the first place, the program fails to form the requisite link between testing and public goals. The project tests personnel in "sensitive" positions, leaving a definitional void for reviewing courts. No attempt is made to explain how drug use by these employees — on or off the job — adversely affects the functioning of the government. Presumably, the White House fears the loss or dissemination of secret information, surely a legitimate social concern. Any evidence, however, that drug use is correlated with leaks or subversion is entirely lacking.<sup>116</sup> Neither scientific nor intuitive analyses link drug use with severe dysfunction among federal employees holding sensitive positions.

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113. Exec. Order No. 12,564, 51 C.F.R. 32889 (1986). Recent Office of Personnel Management (OPM) regulations more fully define the scope of testing. The pool of employees extends to all presidential appointees, law enforcement officials, and employees with access to classified information. Approximately 2.2 million workers fall into this last category. The regulations require agency heads to outline their own programs within these employee groups. See Havemann, *U.S. Drug War Allows First-Offense Firing*, Washington Post, Nov. 28, 1986, at A1, col. 1. Recent federal court decisions have already placed the program in legal jeopardy. See *National Treasury Employees Union v. Von Raab*, Civ. 86-3522 (E.D. La. Nov. 14, 1986) (LEXIS, Genfed library, Dist file) (striking down the Customs Service's testing procedures).

114. The program also makes vague references to voluntary procedures for non-sensitive positions. While it is not entirely clear from the order what form testing might take, this formula falls under the aegis of consent, discussed *supra* in § V(b).

115. However, the executive order makes express provisions for visual supervision of urination in instances where the "agency has reason to believe that a particular individual may alter or substitute the specimen to be provided." Exec. Order No. 12,564, *supra* note 113, at 32891. It is not clear, however, what level of reason is required under these conditions.

116. An empirical showing that drug users are likely to talk with suspicious-looking Russians or even more suspicious *New York Times* reporters might begin a rational justification of the program. This showing seems unlikely given the presently known propensities of narcotics abusers.

In addition, even if this linkage between drug testing and public safety exists, no actual problem justifies the abrogation of constitutional rights. The executive order contains no evidence indicating that drug abuse has actually endangered public safety; no claim emerged that self-policing, self-educational programs, or other non-intrusive alternatives to drug testing have proved inadequate. Such omissions suggest that the Reagan program functions as a mechanism to enforce social policy at the expense of government employees' rights.

Third, even if drug testing is implemented over these objections, the Civil Service Reform Act bars the government from taking significant action against an employee on the sole basis of drug testing evidence.<sup>117</sup> The federal judiciary has adopted a relational test that forces the government to prove that arguably off-duty activity infringes upon the rights of the employer.<sup>118</sup> As the courts have generally not viewed urinalysis results as probative of job impairment, a mere positive test result would not justify dismissal.<sup>119</sup> Consequently, since action against personnel is effectively precluded, the

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117. The Civil Service Reform Act, 5 U.S.C. § 7513(a) (1982), provides that "an individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service." Despite the continued vitality of the Civil Service Reform Act, the present Administration has indicated its intention to fire some employees on a first-offense basis. See Havemann, *supra* note 113, at A1, col. 1.

118. See, e.g., *Young v. Hampton*, 568 F.2d 1253 (7th Cir. 1977) (holding that the government failed to prove that an off-duty conviction for possession of controlled substances impaired the efficiency of the Civil Service). See also *D.E. v. Department of the Navy*, 721 F.2d 1165 (9th Cir. 1983); *Gloster v. General Services Admin.*, 720 F.2d 700 (D.C. Cir. 1983); *Bonet v. United States Postal Serv. (Bonet I)*, 661 F.2d 1071 (5th Cir. 1981). But see *Hayes v. Department of the Navy*, 727 F.2d 1535 (Fed. Cir. 1984). See generally Comment, *Judicial Review of Dismissals of Civil Service Employees for Off-Duty Misconduct: The Approach of the Federal Circuit*, 34 AM. U. L. REV. 439, 449 (1985). Recognizing this problem, the Administration has submitted legislation to alter the nexus test of the Civil Services Reform Act.

119. The federal courts have generally rejected the contention that the employment context prevents recourse to constitutional norms. See generally *Allen v. City of Marietta*, 601 F. Supp. 482, 491 (N.D. Ga. 1985). Cf. *New Jersey v. T.L.O.*, 105 S. Ct. 733 (1985); *Marshall v. Barlow's Inc.*, 436 U.S. 307, 312-13 (1978); *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967) (contending that it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior"). However, some courts have suggested that the existence of an employment relationship creates a reduced social and individual expectation of privacy. See *Alinovi v. Worcester School Comm.*, 766 F.2d 660, 666-67 (1st Cir. 1985), modified, 777 F.2d 776 (1st Cir. 1985), cert. denied, 55 U.S.L.W. 3231 (1986); *United States v. Nasser*, 476 F.2d 1111, 1123 (7th Cir. 1973); *United States v. Collins*, 349 F.2d 863, 867-68 (2d Cir. 1965), cert. denied, 383 U.S. 960 (1966). Compare *Ortega v. O'Conner*, 764 F.2d 703 (9th Cir. 1985), cert. granted in part, 106 S. Ct. 565 (1986) (finding an employee search unreasonable due to procedural errors and the absence of an employment nexus).



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invasion of privacy rights engendered by government drug testing can reward the public with only marginal safety gains.

### VII. *Conclusion*

The framers of the fourth amendment never envisioned many of the exigencies of modern society. Balancing tests have proven necessary and effective in adapting original doctrine to current social and individual interests. The peculiar difficulties posed by employee drug testing suggest that such intrusions violate the reasonableness test unless the government can clearly show several factors: the existence of a present danger posed by employee drug use, the inadequacy of self-help and self-policing, the construction of effective procedural and confidentiality safeguards, and the formulation of a discrete group of employees who, because of the nature of their job, interact with the public within the scope of a fundamentally dangerous occupation.

This article leaves open the question of what jobs might fit this description, but the implications of the analysis should be clear. Even if the burdensome evidentiary barrier established by a present danger standard is overcome, few government employees' activities pose a substantial hazard to social safety. Historically, government workers have served as lightning rods for new waves of societal concern. At present, a sense of urgency over drug abuse pervades this country. It is a serious problem, long exacerbated by government neglect. But this new war on drugs should not be turned into marijuana McCarthyism. There is a time and a place for prosecution of abusers of narcotics. The government workshop is not that place.

